

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellant,**

**v**

**TIA MARIE-MITCHELL SKINNER  
Defendant-Appellee.**

**No. 152448**

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**St. Clair CC: 10-002936-FC  
COA No. 317892**

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**BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS  
AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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**Statement of the Question**

**I.**

**Is the decision that a juvenile murderer should be sentenced to life without parole a finding of fact that must be made by a jury beyond a reasonable doubt?**

**Amicus answers: NO**

**Statement of Facts**

Amicus joins the statement of facts of the People of the State of Michigan.

## Argument

### I.

The decision that a juvenile murderer should be sentenced to life without parole is not a finding of fact, but a moral judgment made after consideration of possible mitigating factors. These factors are not themselves facts requiring proof beyond a reasonable doubt, and indeed the defendant could be required to shoulder the burden of proof as to their existence, if the factors were susceptible to a burden of persuasion. This ultimate decision is a determination of *the sentence itself*, not a finding of fact, and one within a range for which the defendant is already eligible by the fact of conviction. It may thus may be made by a judge, the conclusion as to the appropriate sentence not being required to be reached beyond a reasonable doubt.

#### A. Introduction

This issue this Court has directed be addressed is “whether the decision to sentence a person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt, see *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), in light of *Montgomery v Louisiana*, 577 US \_\_\_\_; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US \_\_\_\_; 132 S Ct 2455; 183 L Ed 2d 407 (2012).”<sup>1</sup> It need not be under the Constitution, and cannot be under the statute.

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<sup>1</sup> *People v. Skinner*, \_\_ Mich. \_\_, 2017 WL 388865 (No. 152448, 1-24-2017).

**1. The statute requires that the sentencing decision be made by the trial court**

There is no question here that MCL 769.25 applies to the sentencing of the defendant, nor that the trial judge followed it in deciding to sentence defendant to life without parole.<sup>2</sup> The statute, a response to the decision of *Miller v Alabama*,<sup>3</sup> provides, in relevant part:

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of [specified offenses].

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(3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. . . . The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

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(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. *At the hearing, the trial court shall consider the factors listed in Miller v Alabama, 576 US \_\_\_\_; 183 L Ed 2d*

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<sup>2</sup> “On March 4, 2014, while defendant's appeal was pending, MCL 769.25 took effect. . . . Following the decision in *Carp*, this Court remanded defendant's case to the trial court for a second resentencing—third sentencing—hearing to be conducted in accordance with MCL 769.25; this Court retained jurisdiction. On second remand, defendant moved to empanel a jury, arguing at the resentencing hearing that a jury should make the factual findings mandated by MCL 769.25(6). The trial court denied defendant's motion . . . and, after hearing evidence from both defendant and the prosecution, the court again sentenced defendant to life without parole for the first-degree-murder conviction.” *People v. Skinner*, 312 Mich. App. 15, 21–22 (2015).

<sup>3</sup> *Miller v. Alabama*, \_\_U.S. \_\_, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

(8) Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any sentencing or resentencing of the defendant under this section.

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.<sup>4</sup>

**2. The conflict-resolution panel in *People v. Hyatt*<sup>5</sup> properly rejected the holding of the panel here that the statute is unconstitutional under the Sixth Amendment because the Sixth Amendment requires that the sentencing decision be made beyond a reasonable doubt by a jury, the conflict panel rightly finding that the Sixth Amendment does not so require**

In *People v. Skinner*,<sup>6</sup> the panel held that the statute is unconstitutional insofar as it commits to the trial judge the responsibility of determining whether the juvenile murderer should receive a sentence of life without parole or a term of years sentence within the range specified in the statute, the statute leaving that decision, after the hearing specified by the statute, to the sound

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<sup>4</sup> Emphasis supplied.

<sup>5</sup> *People v. Hyatt*, \_\_ Mich. App \_\_, 2016 WL 3941269 (No. 325741, 7-21-2016 ) (further review granted, \_\_ Mich. \_\_, 2017 WL 388978 (No. 153081, 1-24-2017)).

<sup>6</sup> *People v. Skinner*, 312 Mich. App. 15 (2015).

discretion of the trial judge. Rather, said the majority of the panel, “the sentencing scheme in this case cannot stand when examined under the lens of the Supreme Court's Sixth Amendment jurisprudence.”<sup>7</sup> The majority concluded that instead the United States Constitution requires that the sentencing decision as to life without parole be made by a jury, the jury being tasked to “make findings on the *Miller* factors as codified at MCL 769.25(6) to determine whether the juvenile's crime reflects ‘irreparable corruption’ beyond a reasonable doubt.”<sup>8</sup> Judge Sawyer dissented, and the majority in this case agreed with his analysis, disagreeing with the majority of the *Skinner* panel. The conflict panel agreed with Judge Sawyer and the *Hyatt* panel:

The Court's decision in *Miller* did not require a sentencing authority to consider an offender's youth before *aggravating* the available penalty. Rather, the Court imposed an individualized sentencing mandate for juvenile offenders convicted of homicide offenses. Individualized sentencing was required to ensure proportionality, not to aggravate the maximum penalty available under the law. Hence, a sentencing authority remains free, under *Miller*, to impose a life-without-parole sentence based solely on the jury's verdict. *Miller* simply holds that a framework of protections required by the Eighth Amendment must be implemented in order to ensure that the imposition of the maximum available penalty—life without parole—is proportionate to the particular offender and the particular offense. In short, the remodeling that *Miller* performed on life-without-parole sentences for juveniles did not touch the ceiling—or floor, for that matter—of the available sentence for juvenile homicide offenders.<sup>9</sup>

The conflict panel is correct.

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<sup>7</sup> *People v. Skinner* slip opinion at 15.

<sup>8</sup> *People v. Skinner* slip opinion at 22.

<sup>9</sup> *People v. Hyatt*, slip opinion at p. 13.

**3. The position of the amicus is that the conflict panel is correct on the Sixth Amendment issue**

Stripped to its essence, the statutory scheme provides that the maximum penalty for 1<sup>st</sup>-degree murder is life in prison, with no possibility of parole, which *shall* be imposed for adult murderers, and *may* be imposed—is statutorily authorized—for juvenile murderers. The trial judge in the latter case is, when the maximum penalty authorized by statute is sought by the prosecuting attorney, to engage in individualized sentencing, as required by *Miller*, and so to consider certain mitigating factors in the exercise of his or her discretion—the so-called “*Miller* factors”—with the judge’s discretion limited to a particular range if the trial judge chooses instead to impose a term of years sentence.<sup>10</sup> This scheme is constitutional. The inquiry begins with a brief review of the United States Supreme Court’s recent Sixth Amendment decisions, and a discussion of *Miller*.

**B. Recent Sixth Amendment decisions do not support a jury-trial requirement for sentencing juvenile murderers to life without parole**

The *Apprendi/Blakely* line of cases establish that it is not judicial fact-finding that trenches on the Sixth Amendment right to jury trial, as fact-finding by the judge to determine a sentence within a statutorily authorized range of punishments is perfectly permissible; rather, it is by judicial fact-finding that *expands* or *aggravates* the maximum punishment otherwise authorized by statute by the conviction of the defendant that the Sixth Amendment right of the defendant is compromised. And so in *Apprendi*<sup>11</sup> the Court considered a state statutory scheme

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<sup>10</sup> 25 to 40 years on the minimum of the range, to a required maximum on the indeterminate term of years of 60 years.

<sup>11</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

where the offense in question, possession of a firearm for an unlawful purpose, was punishable with between five years and 10 years, so that the maximum statutory penalty upon conviction by the jury was 10 years. But under a separate provision, known as the state's "hate crime" law, the sentence range was extended to 10 to 20 years, thereby enhancing the maximum possible incarceration from 10 years to 20 years, on a finding by a preponderance of the evidence by the trial judge at sentencing that in committing the crime the defendant acted with a particular purpose; namely, to "intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

The United States Supreme Court phrased the question before it as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."<sup>12</sup> Observing that the answer to this question was "foreshadowed by our opinion in *Jones v. United States* . . . construing a federal statute," where the Court had held that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt,'" the Court concluded that "the Fourteenth Amendment commands the same answer in this case involving a state statute."<sup>13</sup>

Critically, the Court distinguished determinations of a sentence that falls within the statutory range from sentences that elevate the maximum permitted by law:

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<sup>12</sup> *Apprendi*, 120 S.Ct. at 2351.

<sup>13</sup> *Apprendi*, 120 S.Ct. at 2355.

We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating *both to offense* and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.<sup>14</sup>

The holding, then, of *Apprendi* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt,”<sup>15</sup> by its own terms, has nothing whatsoever to do with “imposing a judgment *within the range* prescribed by statute,” where the trial judge is free to take “into consideration various factors relating both to offense and offender.”

The *Blakely*<sup>16</sup> decision is entirely consistent with *Apprendi*. The State of Washington had a determinate sentencing scheme, and *Blakely* was convicted of kidnaping, which under state law was punishable by a term not to exceed 10 years. But the state sentencing scheme *required* that, based on the fact of conviction alone, the defendant be sentenced to a determinate term of between 49 to 53 months through a calculation of guidelines, so that the most defendant could receive by statute was 53 months. The defendant pled guilty. But the sentencing scheme allowed a trial judge to impose a determinate term above the maximum of the standard range for the determinate term on a finding of “substantial and compelling reasons justifying an exceptional sentence,” the statute providing an illustrative list of aggravating factors, with those factors and any other aggravating factor employed by the judge required to be outside of those used in

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<sup>14</sup> *Apprendi*, 120 S.Ct. at 2358 (first emphasis supplied; second supplied by the Court).

<sup>15</sup> *Apprendi*, 120 S.Ct. at 2362-2363 (emphasis supplied).

<sup>16</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

computing the standard range sentence for the offense. The trial judge, after ultimately conducting a lengthy hearing, found that Blakely had acted with “deliberate cruelty,” and exceeded the top of the determinate sentence range by 37 months, giving Blakely a “flat” or determinate sentence of 90 months. Thus, Blakely’s maximum sentence was enhanced slightly more than 3 years by a factual finding by the trial judge at sentencing that the crime had been committed in a certain manner.

The Supreme Court held that for purposes of *Apprendi* the “statutory maximum” is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant . . . . In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding *additional* facts, but the maximum he may impose *without* any additional findings.”<sup>17</sup> As Justice Scalia noted:

In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.<sup>18</sup>

And as put in the *Alleyne* decision discussing *Apprendi*, concerning the enhancement of statutory mandatory-minimums sentences rather than the aggravation of a statutory maximum, “Any *fact*

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<sup>17</sup> *Blakely*, 124 S.Ct. at 2537 (emphasis supplied).

<sup>18</sup> *Blakely*, 124 S.Ct. at 2541 (emphasis supplied). See also *Alleyne v. United States*, 570 U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.”<sup>19</sup>

**C. *Miller v. Alabama* and *Montgomery v. Louisiana*<sup>20</sup> are Eighth Amendment cases and do not implicate the Sixth Amendment**

*Miller* and *Montgomery* are Eighth Amendment cases. The defendants in the consolidated cases in *Miller* were each convicted of 1<sup>st</sup>-degree murder, and sentenced to life without parole under a statutory scheme that required that disposition. The Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments’”<sup>21</sup> because a mandatory scheme as applied to juvenile murderers “*prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change,’*” and “runs afoul of [the Supreme Court’s] cases’ requirement of individualized sentencing for defendants facing the most serious penalties.”<sup>22</sup>

In other words, “[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole,”<sup>23</sup> said the Court—saying absolutely nothing about any constitutional requirement for the finding, by the sentencing judge or by a jury, of aggravating facts concerning the commission of the 1<sup>st</sup>-degree murder—and by “removing youth

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<sup>19</sup> *Alleyne v. United States*, \_\_ U.S. \_\_, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013).

<sup>20</sup> *Montgomery v. Louisiana*, 577 US \_\_\_, 136 S Ct 718, 193 L Ed 2d 599 (2016).

<sup>21</sup> *Miller v. Alabama*, 132 S.Ct. at 2460.

<sup>22</sup> *Miller v. Alabama*, 132 S.Ct. at 2460 (emphasis added).

<sup>23</sup> *Miller v. Alabama*, 132 S.Ct. at 2465.

from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender.”<sup>24</sup> Where the question is the imposition of the most serious penalty allowed for a juvenile offender—life without parole, the Court having previously prohibited the death penalty for juvenile offenders under any circumstances<sup>25</sup>—individualized sentencing is required. The penalty of life without parole was not prohibited by the Court, rather, the Court required individualized sentencing, striking the mandatory nature of the penalty. The sentencer must be able to take into account the “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,” of the defendant. Further, the sentencer must consider “the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.” And the sentencer must take account of “the extent of [the defendant’s] participation in the conduct and the way familial and peer pressures may have affected [the defendant].”<sup>26</sup> The Court also speculated, naively, amicus believes, given its rather distant remove, that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . because of the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable

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<sup>24</sup> *Miller v. Alabama*, 132 S.Ct. at 2466.

<sup>25</sup> *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

<sup>26</sup> *Miller v. Alabama*, 132 S.Ct. at 2468.

corruption,”<sup>27</sup> but did not “*foreclose* a sentencer's ability to make that judgment in homicide cases,” requiring rather that the sentencer “*take into account* how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,” in the manner it had described.<sup>28</sup>

The decision, then, requires individualized sentencing where the sentencer must consider mitigating evidence concerning “how children are different”:

our individualized sentencing decisions make clear that a judge or jury must *have the opportunity to consider mitigating circumstances* before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.<sup>29</sup>

The opinion says nothing of a need to narrow the class of those who are “life-without-parole eligible” by identifying aggravating circumstances concerning the manner in which the particular 1<sup>st</sup>-degree murder was committed, nor did it give any hint that the determination of a constitutionally proportionate sentence through individualized sentencing for a juvenile must be accomplished by a jury.

*Montgomery* determined the question of retroactivity, and does nothing whatever to alter or expand the *Miller* holding to include a Sixth Amendment jury-right holding; indeed, as will be seen, if anything *Montgomery* further makes clear that *Miller* is about the opportunity for a

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<sup>27</sup> *Miller v. Alabama*, 132 S.Ct. at 2469.

<sup>28</sup> *Miller v. Alabama*, 132 S.Ct. at 2466 (emphasis added).

<sup>29</sup> *Miller v. Alabama*, 132 S.Ct. at 2475 (emphasis added).

showing of mitigation, and the obligation of the sentencing judge to consider those factors in mitigation that may be present.

**D. The *Skinner* panel was mistaken in its “default sentence” analysis of the statute**

Rather than viewing *Miller* as having established a requirement for individualized sentencing, the sentencer to “take into account” in a holistic fashion those considerations mentioned in the opinion—“the age of the defendant as a juvenile, and the features of that age, such as immaturity, impetuosity, and failure to appreciate risks and consequences”; “the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;” and “the extent of [the defendant’s] participation in the conduct and the way familial and peer pressures may have affected [the defendant]”—the *Skinner* majority saw *Miller* as establishing a “framework” through its mention of these considerations by which it is to be determined “whether a juvenile’s homicide offense reflects ‘irreparable corruption,’”<sup>30</sup> the panel majority viewing a “reflection of irreparable corruption” as a fact rather than a judgment.

The majority found that the legislative response to *Miller* established a “default sentencing range” of an indeterminate term of years for juveniles convicted of 1<sup>st</sup>-degree murder of 25-40 years on the minimum, and not less than 60 years on the maximum, noting that this Court had said in *People v. Carp* that “MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age.”<sup>31</sup> The majority

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<sup>30</sup> *People v. Skinner*, 312 Mich. App. at 28.

<sup>31</sup> *People v. Skinner*, 312 Mich. App. at 31, quoting *People v. Carp*, 496 Mich. 440, 458 (2014).

found this range to be the “default” because the statutory scheme requires a term-of-years sentence within this range *unless* the prosecutor files a motion seeking a sentence of life without parole (“absent a motion by the prosecutor seeking a sentence of life without parole, *the court shall sentence the individual to a term of imprisonment* for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years”). It is only when that motion is filed that, under the statute, the trial judge is to conduct a hearing and then “shall consider” the factors noted in *Miller*, which provides the individualized sentencing required by the United States Supreme Court. The majority continued, “Stated differently, at the point of conviction, absent a motion by the prosecution and without additional findings on the *Miller* factors, the maximum punishment that a trial court may impose upon a juvenile convicted of first-degree murder is a term-of-years prison sentence. . . . Thus, following her jury conviction, defendant was subject to a term-of-years prison sentence. Once the prosecuting attorney filed a motion to impose a life-without-parole sentence, defendant was exposed to a potentially harsher penalty contingent on findings made by the trial court.”<sup>32</sup>

The majority overread *Carp*, and introduced a new and unsupported concept—the “default sentence”—unhelpful to the inquiry. In *Carp* this Court was simply referring to the statutory provision allowing the prosecutor to choose whether to *seek* the highest sentence authorized by the verdict by proceeding with the sentencing hearing; if not, then, that highest sentence not being sought, the remaining sentencing option open to the judge is a minimum of 25-40 years, and a maximum mandated at not less than 60 years. In this sense “default” means

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<sup>32</sup> *People v. Skinner*, 312 Mich. App. at 44-45.

“a selection automatically made in the absence of a choice made by the user,”<sup>33</sup> the “user” here being the prosecuting attorney, who may *chose* whether to seek the highest penalty authorized by statute. Surely it is not the law that because “absent a motion by the prosecutor seeking a sentence of life without parole, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years” a jury must find beyond a reasonable doubt at a sentencing hearing that the prosecutor has *made that motion*, for without it the sentence could not be life without parole. But this choice entails no constitutional consequences, and the use of “default sentence” confuses the matter. The motion is not a “fact” the jury must find, but a *trigger* for consideration of the highest sentence authorized by the verdict. The constitutional question is whether the statutory scheme establishes some “*fact* that, by law, increases” the statutory penalty for 1<sup>st</sup>-degree murder where committed by a juvenile, for *that* “is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” The majority’s statement that “at the point of conviction, absent a motion by the prosecution and *without additional findings on the Miller factors*, the maximum punishment that a trial court may impose upon a juvenile convicted of first-degree murder is a term-of-years prison sentence”<sup>34</sup> begs this question. Certainly, the trial court must “consider” the “*Miller factors*” and make findings on them—to facilitate appellate review—but whether those “factors” are “*facts* that, by law, increase” the penalty is the constitutional question, and one that the *Skinner* majority never actually confronted.

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<sup>33</sup> Paraphrasing Merriam-Webster.

<sup>34</sup> *People v. Skinner*, slip opinion at 14-15 (emphasis added).

The majority also required that the jury “make findings on the *Miller* factors as codified at MCL 769.25(6).”<sup>35</sup> What is the jury to do? The majority gave no hint. Are there to be boxes of some sort on a sentencing-verdict form, where the jury indicates its findings as to certain factors? And what are those? How can the jury indicate its “findings” with regard to such matters as the home life of the defendant, influence or pressure by peers, level of maturity, and other factors, other than by some form of narrative, as would be done by a judge at sentencing? The opinion requires that the conclusion of “irreparable corruption” be made beyond a reasonable doubt as though it were a fact rather than a judgment, but certainly the members of the jury need not unanimously agree as to the sort of matters indicated in *Miller*, unless the majority actually means that these are *themselves* elements, as it actually elsewhere says, as will be discussed subsequently—would the jury indicate it has found that the crime was not “impetuous” after a majority vote? And by what standard of proof? *Skinner* provided no guidance as to what the jury is to do in terms of “findings.”

**E. The “*Miller* factors” are not facts in aggravation of the crime that enhance the sentence, they are considerations in mitigation that must be taken into account in individualized sentencing for the sentencer to determine whether life without parole should be imposed on this individual murderer, which is a moral judgment, not a finding of fact**

Because the *Skinner* majority viewed the term-of-years sentence as the “default,” it found that the statutory scheme allowed an “enhancement” of what amounted to a statutory maximum “based on findings made by a judge not a jury.”<sup>36</sup> This the majority found impermissible,

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<sup>35</sup> The statute requires the judge to set out his or her findings on the *Miller* factors, which would be done in a narrative form, obviously to assist appellate review. Judges are expected to set forth their findings in circumstances where juries are not, as in rendering verdicts.

<sup>36</sup> *People v. Skinner*, slip opinion at 15.

because “akin to the schemes at issue in *Apprendi*, *Ring*, *Blakely* and *Cunningham*. Each of those cases involved a sentencing scheme that authorized a judge to enhance a defendant's maximum sentence based solely upon judicial fact-finding.”<sup>37</sup>

But what “fact” or facts in aggravation of those found by the verdict is the trial judge required by the statute to find in order to “enhance” the defendant’s punishment? The majority in *Skinner* seems to say that it is “irreparable corruption,” advertent to the single use of that term in *Miller*, where the Court referred to the difficulty in “distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”<sup>38</sup> But the majority is hardly clear on this point. It also says that “Clearly, the findings mandated by MCL 769.25(6) ‘exposed [defendant] to a greater punishment than that authorized by the jury's guilty verdict;’ *the findings therefore acted as the ‘functional equivalent’ of elements of a greater offense that were required to be proved to a jury beyond a reasonable doubt,*”<sup>39</sup> citing to *Ring*. It plainly appears that the majority here is requiring that the jury make “findings” *beyond a reasonable doubt* on the “*Miller*” factors themselves, which is quite remarkable. But at a different point the majority seems to say that it is only the conclusion of “irreparable corruption” after “consideration” of the *Miller* factors that must be found beyond a reasonable doubt by a jury, the majority saying that after conviction “the court should impanel a jury and hold a sentencing hearing where the prosecution is tasked with proving that the factors in *Miller* support that the juvenile's offense *reflects ‘irreparable*

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<sup>37</sup> *People v. Skinner*, slip opinion at 15.

<sup>38</sup> *Miller v. Alabama*, 132 S.Ct. at 2469.

<sup>39</sup> *People v. Skinner*, 312 Mich. App. at 46.

*corruption' beyond a reasonable doubt. . . .* Following the close of proofs, the trial court should instruct the jury that it must consider, whether *in light of the factors* set forth in *Miller* and any other relevant evidence, the *defendant's offense reflects irreparable corruption beyond a reasonable doubt* sufficient to impose a sentence of life without parole.”<sup>40</sup> Which is it? In actuality, it is neither.

**1. The death-penalty analogy demonstrates that mitigating factors are not elements to be proven by the prosecution beyond a reasonable doubt to a jury**

After the United States Supreme Court held that the death penalty may not be imposed on a mandatory basis no matter the crime, proportionality and individualized sentencing being required in the death-penalty context, states with the death penalty, as well as the federal government, were compelled “to specify particular ‘aggravating factors’ that must be found before the death penalty can be imposed.”<sup>41</sup> The Arizona sentencing scheme provides an appropriate example of aggravating facts:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in

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<sup>40</sup> *People v. Skinner*, 312 Mich. App. at 60 (emphasis supplied).

<sup>41</sup> *Ring v. Arizona*, 536 U.S. 584, 610, 122 S.Ct. 2428, 2444, 153 L.Ed.2d 556 (2002) (Scalia, J., concurring).

addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while:

(a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

(b) On probation for a felony offense.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, that were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age, was an unborn child in the womb at any stage of its development or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

11. The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.

12. The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for

a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

13. The offense was committed in a cold, calculated manner without pretense of moral or legal justification.

14. The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.

Mitigating factors that may be considered are essentially unlimited, something required by the Supreme Court for individualized sentencing,<sup>42</sup> and the Arizona scheme again provides an example:

G. The trier of fact shall consider as mitigating circumstances *any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:*

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

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<sup>42</sup> See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 4, 8-9, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

### 5. The defendant's age.<sup>43</sup>

Because aggravating facts are facts that aggravate the sentence the defendant could otherwise receive based on the verdict, as in *Apprendi*, defendant is entitled to a jury determination of those facts beyond a reasonable doubt. Though the statute authorizes the death penalty, it only does so upon a finding of aggravating *facts* beyond those elements found by the jury in convicting the defendant of the crime. Whether calling those facts an element or a sentencing factor, these statutory schemes require a finding of fact in aggravation of the crime that was not found by the jury in returning a guilty verdict.<sup>44</sup>

But the *decision*—reaching the conclusion—that the death penalty should or should not be imposed after an aggravating fact is found beyond a reasonable doubt by the jury (unless waived by the defendant), need *not* be made by a jury beyond a reasonable doubt; indeed, so long as it is the jury that concludes that the aggravating factor has been proven beyond a reasonable doubt, a judge may constitutionally override a jury's decision recommending life in prison.

*Ring* held that any aggravating fact essential to death eligibility must be determined by a jury or admitted by the defendant—it did not conclude that the death sentencing decision itself must be made by a jury rather than a judge. *This 'selection' decision is not one of finding fact*, and most lower courts have held that once the jury has found the facts necessary to authorize the imposition of the death penalty, a judge may decide whether that penalty is appropriate without violating the defendant's rights under the Sixth Amendment.<sup>45</sup>

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<sup>43</sup> A.R.S. § 13-751 (emphasis supplied).

<sup>44</sup> *Ring v. Arizona*, 536 U.S. 584 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 616, 620, 193 L. Ed. 2d 504 (2016).

<sup>45</sup> LaFave, Israel, King, & Kerr, 6 *Criminal Procedure* (4<sup>th</sup> Ed.), § 26.4(i) (emphasis supplied).

Further, the burden of persuasion on *mitigating* factors may constitutionally be placed *on the defendant* by at least a standard of a preponderance of the evidence. In rejecting a claim that the jury must be instructed that it need not find mitigating circumstances beyond a reasonable doubt, in language particularly helpful here the Court not long ago said that:

Approaching the question in the abstract, and without reference to our capital-sentencing case law, *we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination* (the so-called ‘selection phase’ of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called ‘eligibility phase’), *because that is a purely factual determination*. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. *Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.*<sup>46</sup>

The ultimate decision as to whether the death penalty should be imposed, then, need not be made by a jury beyond a reasonable doubt. In *United States v. Gabrion*<sup>47</sup> the defendant argued that the ultimate decision regarding whether mitigating circumstances outweighed the aggravating fact(s) found beyond a reasonable so that the death penalty should not be imposed had to be made by the jury beyond a reasonable doubt. The en banc Sixth Circuit rejected the claim. With regard to aggravating facts which, must be found beyond a reasonable doubt, the court said that “These sorts of findings—that a particular statement might influence its recipient, or that the defendant acted with a particular state of mind, or possessed a particular quantity of

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<sup>46</sup> *Kansas v. Carr*, \_\_U.S.\_\_, 136 S.Ct. 633, 642, \_\_L.Ed.2d\_\_ (2016) (emphasis supplied); see also *Kansas v. Marsh*, 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

<sup>47</sup> *United States v. Gabrion*, 719 F.3d 511 (CA 6, 2013) (en banc).

drugs, or was himself the triggerman, rather than just an accomplice—are different in kind from the ‘outweighs’ determination required by 3593(e). *Apprendi* findings are binary—whether a particular fact existed or not.”<sup>48</sup> But for the balancing or weighing of mitigating factors—on which the burden or proof may be placed on the defendant, and thus need not be found against the defendant beyond a reasonable doubt—as against an aggravating fact or factors found beyond a reasonable doubt, the statute uses the terms “consider, justify, outweigh,” terms which “reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, *the judgment is moral* . . . . What 3593(e) requires, therefore, is not a finding of fact, *but a moral judgment*.”<sup>49</sup> In other words, said the court, what the federal statute requires—and consistently with the Constitution—“is not a finding of fact in support of a particular sentence. . . . [It] requires. . . a determination of *the sentence itself*, within a range for which the defendant is already eligible. That makes this case different from any in which the Supreme Court has applied *Apprendi*.”<sup>50</sup> The defendant was eligible for the death sentence once the jury convicted and then found statutory aggravating factors beyond a reasonable doubt. At the point, though mitigating factors were presented, “the jury did not need to find any additional facts in order to recommend that Gabrion be sentenced to death. It only needed to decide, pursuant to the weighing of factors

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<sup>48</sup> *United States v. Gabrion*, 719 F.3d at 532.

<sup>49</sup> *United States v. Gabrion*, 719 F.3d at 532-533 (emphasis supplied).

<sup>50</sup> *United States v. Gabrion*, 719 F.3d at 533 (emphasis supplied).

described in the statute, that such a sentence was ‘just[ ]’ . . . *And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact.*”<sup>51</sup>

**2. Application to the Michigan sentencing scheme to the Michigan sentencing scheme demonstrates that there is no right to a jury determination of sentence**

Neither *Miller*, nor the Michigan sentencing scheme, which refers only to the “*Miller* factors,” requires the finding of any aggravating fact regarding the commission of the crime without which the sentence of life without parole cannot be imposed. “*Apprendi* findings are binary—whether a particular fact existed or not,” and the statute contains no requirement for any such “binary finding,” nor does *Miller*. *Miller* requires instead that the sentencer “must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” As to mitigating factors, the Court said in *Kansas v. Carr*, as noted previously, that “we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination . . . . *Whether mitigation exists, however, is largely a judgment call (or perhaps a*

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<sup>51</sup> *United States v. Gabrion*, 719 F.3d at 533 (emphasis supplied). The court noted that it did not stand alone on the matter: “Every circuit to have addressed the argument that Gabrion makes here—six circuits so far—has rejected it. *See United States v. Runyon*, 707 F.3d 475, 516 (4th Cir.2013); *United States v. Fields*, 516 F.3d 923, 950 (10th Cir.2008); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir.2007); *United States v. Sampson*, 486 F.3d 13, 31 (1st Cir.2007); *United States v. Fields*, 483 F.3d 313, 345–46 (5th Cir.2007); *Purkey*, 428 F.3d at 749. Today we become the seventh.”

These decisions, as well as *Kansas v. Carr*, give the lie to the *Skinner* majority’s statement that “The dissent’s contention that there exists a means by which all of these factors must be ‘considered’ without leading to a single finding of fact defies logic. In an attempt to bolster its flawed analysis, the dissent focuses on the word “consider” in MCL 769.25(6): specifically, the statute provides that, [a]t the hearing, the trial court shall *consider* the factors listed in [Miller]. . . .” (emphasis added). Post at 9-10. The dissent contends that because the statute directs a court to “consider” the factors as opposed to make findings on the factors, the statute therefore does not require judicial fact finding to increase a juvenile homicide offender’s maximum sentence to life without parole. *Id.* at 9-11. However, consideration of factors necessarily requires fact finding . . . . “ *People v. Skinner*, 312 Mich. App. at 54-55.

value call); what one juror might consider mitigating another might not.” Just as the decision to impose the death penalty after the required aggravating factor or factors, found beyond a reasonable doubt—that requirement being absent in *Miller*—are weighed as against any mitigating factor or factors, the burden of proof of which is not on the prosecution, but may be placed on the defendant, is not a factual determination, but a moral judgment, “a determination of *the sentence itself*, within a range for which the defendant is already eligible,” so too with the Michigan scheme. Whether denominated “irreparable corruption” or something else, the death-penalty decision is a judgment of the sentence itself that is to be imposed, and so here. After consideration of mitigating circumstances<sup>52</sup>—the “*Miller* factors”—the judge is to make a determination as to the sentence itself, and to make findings as to his or her considerations, as an aid to appellate review. In making the sentencing decision, that moral judgment, the judge is not “making a finding of fact.” Even if denominated a conclusion of “irreparable corruption,” this is not a factual finding, but the decision—the conclusion on the question—of whether the defendant should receive the highest penalty authorized by the statutory scheme. It need not, then, be made beyond a reasonable doubt, or by a jury,<sup>53</sup> and the statute does not so require. The statute being constitutional, it should be implemented as written.

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<sup>52</sup> That “irreparable corruption” is not a “fact” that the prosecution must prove to the jury beyond a reasonable doubt is also supported by the decision in *Montgomery v. Louisiana*, \_\_\_U.S.\_\_\_, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), saying that “prisoners like Montgomery *must be given the opportunity to show their crime did not reflect irreparable corruption*” (emphasis supplied).

<sup>53</sup> And several courts have so held. See *State v. Fletcher*, 149 So.3d 934 (La.Ct.App. 2014)(cert denied, *Fletcher v. Louisiana*, —U.S.—, 136 S.Ct. 254 (2015)); *Commonwealth v. Batts*, 125 A.3d 33 (Pa.Super. 2015) (app. granted in part, 135 A.3d 176 (Pa. 2016)); *State v. Lovette*, 758 S.E.2d 399 (Ct. App. NC, 2014) (finding of “irreparable corruption” not required); *State v. Ramos*, —P.3d— (Wash., 2017)(finding of “irreparable corruption” not required);

**F. Conclusion: the Michigan statutory scheme is constitutional**

Unlike the death-penalty context, neither *Miller* nor the statute requires any “eligibility phase” at the sentencing hearing where a fact or facts in aggravation of the criminal offense must be proven beyond a reasonable doubt, and to a jury if the defendant so requests. The defendant is “life-without-parole eligible” upon the conviction for 1<sup>st</sup>-degree murder. *Miller* and the statute compel individualized sentencing, and thus requires here what in the death-penalty context is known as the “selection phase,” where that which renders the defendant eligible for the most severe penalty is weighed in the balance with mitigating factors, *Miller* requiring that the sentencer take into account—consider—what it describes as the “mitigating qualities of youth.” These mitigating factors are not binary facts that must be proven beyond a reasonable doubt; indeed, the Supreme Court has said as to mitigating factors that “we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination,” and the burden of proof could be placed on the defendant with regard to these. The weighing decision *is* the sentencing decision, a moral judgment, that need not be made beyond a reasonable doubt and thus need not be made by a jury. The statutory scheme is constitutional. This Court should so hold.

**Relief**

Wherefore, amicus respectfully requests that this Court find that the statute as written is constitutional.

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